October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated, *Petitioner*

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an Unincorporated Association, *Respondents*

BRIEF OF AMICUS CURIAE, THE COMMONWEALTH OF PENNSYLVANIA, IN SUPPORT OF PETITIONER

Certiorari To The United States Court of Appeals For The Second Circuit

ISRAEL PACKEL
Attorney General of the Commonwealth of Pennsylvania
Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17120

Of Counsel:
Lawrence Silver,
Deputy Attorney General,
Chief, Litigation Division
Gerry J. Elman,
Deputy Attorney General

David Berger
H. Laddie Montague, Jr.
David Berger, P.A.,
1622 Locust Street
Philadelphia, Pennsylvania 19103

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

TABLE OF CITATIONS—(*Continued*)

TABLE OF CITATIONS—*(Continued)*

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents

Certiorari To The United States Court of Appeals For The Second Circuit.

The Commonwealth of Pennsylvania files this brief as *Amicus Curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

INTERESTS OF THE AMICUS CURIAE

The issues before this Court in the case *sub judice* are of great significance and importance to the *Amicus Curiae*, the Commonwealth of Pennsylvania, in the protection of its rights, the rights of its citizens and those of the political subdivisions within Pennsylvania's borders.[1] The meaningful application of the class action procedure pursuant to Rule 23, Federal Rules of Civil Procedure, has enabled *Amicus Curiae* in many cases to recover for its own treasury, the treasuries of its political subdivisions, and, in some instances, for its citizens,[2] overcharges resulting from antitrust violations. In so doing, the Commonwealth has been an effective enforcer of the antitrust laws.[3] In this area, Rule 23 has enabled the Commonwealth to act where it otherwise might not and more particularly, enabled the Commonwealth to secure redress for its political subdivisions and citizens in instances when clearly the latter were powerless to protect themselves. Accordingly, the viability and effectiveness of Rule 23 is of great concern to the Commonwealth.

In addition to the recovery of overcharges, the class suit hopefully has had the prophylactic effect of deterring future violations of the antitrust laws by potential violators. Indeed, the threat of a judgment in favor of an entire class has a greater preventative value than a judgment against a single member of that class.

---

1. States and municipalities "are inherently charged with the duty to protect wide-reaching public interests." *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E.D. Pa. 1962).

2. In the antibiotics litigation, *State of West Virginia v. Chas. Pfizer Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971), the Commonwealth and other states and counties and cities were able to recover by way of settlement 50% of the purchases of tetracycline products for its citizens.

3. "When the State seeks damages for injuries to its commercial interests, it may sue under §4 (of the Clayton Act)." *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972).

As in the case of many of the sovereign states, the Commonwealth's Attorney General's Office has limited resources to allocate toward antitrust enforcement. Antitrust litigation, almost by definition, is complex, protracted and costly. The class action, pursuant to Rule 23, has allowed the Commonwealth, other states and their subdivisions to allocate their resources most effectively in enforcing these important laws. Indeed, the class action allows a state or its subdivisions to pursue its rights through class actions commenced on its behalf by others and likewise to protect the rights of other injured parties through class actions brought by it. Moreover, where a state is powerless to bring litigation on behalf of its injured citizens, e.g. *State of California v. Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir. 1973) Rule 23 enables the citizens to protect themselves, just as in the case *sub judice*.

While the District Court in the case *sub judice*, 52 F.R.D. 253 (S.D. N.Y. 1971) and 54 F.R.D. 565 (S.D. N.Y. 1972), gave life and vitality to Rule 23, the Court of Appeals for the Second Circuit, (App. 92a *et seq.*)[4] extinguished that life. The Court of Appeals ruling in *Eisen* threatens the effective private enforcement of the antitrust laws as it has developed since the *Electrical Equipment* cases.[5] The Second Circuit decision, if not the "death knell," clearly represents a crippling blow to the practical application of Rule 23 and its role in the effective enforcement of important federal laws, including, *inter alia*, the anti-trust and securities laws and other violations of law similarly injuring large classes of persons.

---

4. Page references are to the pages of the Appendix which accompanied the Petition for a Writ of Certiorari.

5. i.e., *City of Philadelphia v. Westinghouse Electric Corporation*, Civ. No. 29810 and related cases (E.D. Pa. 1961); *City of Chicago v. Allen Bradley Company*, 32 F.R.D. 448 (N.D. Ill. 1963).

ARGUMENT

A. While the District Court decision enhanced the viability and effectiveness of Rule 23, the Court of Appeals decision emasculates Rule 23.

In *State of Hawaii v. Standard Oil Company of California*, 405 U.S 251, 266 (1972), this Court stated:

> ". . . Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed *Hawaii's* class action only because it was unwieldy, *it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens.*" [Emphasis added].

In *Eisen*, the District Court's decision, 52 F.R.D. 253 (S.D. N.Y. 1971), construed and applied Rule 23 so as to assure its use when its substantive requirements were met and sought to find solutions to the administrative and practical problems which sometimes arise in its application. In so doing, the District Court found practical solutions to the "best notice practicable under the circumstances", the "cost of notice", and the individual questions of damages versus "fluid class recovery." In bold contrast to the District Court's treatment of these problems, the Second Circuit crushed the District Court's thoughtful and pragmatic solutions to these inherent administrative issues. The consequence of the Second Circuit's decision, if left to stand, will be to limit severely the use of class actions and unlike this Court's observation in *Hawaii*, it will, for practical purposes, constitute a holding "that a State could never bring a class action on behalf of some or all of its consumer citizens."

The courts have generally subscribed to the view that in determining the "best notice practicable", where possi-

ble, the notice provisions of Rule 23 should not be so stringent as to defeat otherwise valid class actions. Indeed, the Second Circuit so held in an earlier *Eisen* decision. 391 F.2d 555 (2d Cir. 1968). Yet this latest *Eisen* decision prescribes a stringent monetary requirement on a class action plaintiff, which requirement most likely will limit the use of Rule 23 to those plaintiffs with a fund available to finance the class action notice.

B. Imposing the costs of notice on a plaintiff may prevent the prosecution of a proper class action; these costs may properly be placed upon defendants.

In most instances, class actions arise in complex and protracted cases involving alleged violations of the antitrust laws. These cases, even without the costs of a class action, are extremely expensive undertakings. More often than not, the expenses can exceed the claims of a single plaintiff. Accordingly, as this Court and other courts have recognized, the class action is an effective device for pursuing small claims which might otherwise remain unremedied. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972); *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 715 (7th Cir. 1968). The additional burden of costs of class notice upon a plaintiff or plaintiffs in any particular instance may surely constitute the final barrier repulsing a plaintiff from commencing a class action. This impediment may properly be removed by placing all or a portion of the initial costs of notice upon defendants.

Sometimes overlooked, and sometimes intentionally so by defendants, is the benefit derived by defendants from the invocation of Rule 23. If in fact the defendants are adjudged not to have violated the law as charged, the defendants receive the protective umbrella of *res judicata* as to all members of the class who received notice and did not elect to exclude themselves from the class action. Rule 23(c)(2). Thus, in one proceeding before one court, the

defendants may defeat all the alleged claims against them, thus removing any threat of multiple litigation. Under the Second Circuit's decision in *Eisen*, the defendants, although potential recipients of this benefit, cannot under any circumstances, be ordered to pay for the very vehicle from which this benefit is derived—CLASS ACTION NOTICE.

In contrast to this benefit to defendants, a plaintiff seeking to be a class representative does not derive such tangible benefits. The class action does increase a plaintiff's economic ability to commence and undertake litigation it might otherwise foresake. It truly benefits the absent class members who, but for the class action, would not have their day in court. But the benefit is only realized if the class prevails on the merits.

The Court of Appeals was concerned with the possibility that defendants who initially pay for the costs of notice will not be reimbursed by plaintiffs if after trial the defendants prevail.[6] What the Second Circuit overlooked was that in that very situation—where the defendants received the *res judicata* protection of Rule 23—the defendants should pay for the class action notice, for it is that judicial procedure by which all class members are bound by the final judgment in defendants' favor.[7]

On the other hand, where plaintiffs and the class are successful, there clearly will be a resulting fund available from which the costs of notice can be repaid to defendants who are required to advance such costs.

Accordingly, whichever way the merits are ultimately determined, defendants who are ordered to advance costs

---

6. ". . . if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose." *Eisen v. Carlisle & Jacquelin*, — F.2d — (2d Cir. 1973), (App. 96a).

7. In several instances, defendants who received benefits from procedural rulings have either voluntarily or been required to bear the expenses caused by that ruling. See *J&B&S Restaurant Corp., Inc. v. Henry's Drive-In, Inc.*, 353 F. Supp. 389 (W.D.N.Y. 1973); *Nocona Leather Goods Co. v. A. G. Spalding & Bros.*, 159 F. Supp. 269, 271 (D. Del. 1958). (Both cases deal with transfer of venue resulting in greater expenses for plaintiff.)

of notice are protected, either by *res judicata* or by reimbursement from the class recovery.

The *Eisen* District Court sought to apportion the costs of notice among the parties only after preliminarily determining the plaintiff's "likelihood of success."[8] It is clear that the greater the plaintiff's likelihood of success, the lesser the risk that a fund will not result from which defendants can be reimbursed for any advance of costs. The District Court was employing its discretion in administering Rule 23; it was applying the Rule so that it would not be a paper tiger but rather an effective judicial tool to be used in the private enforcement of the antitrust laws.

Amicus Curiae respectfully suggests that the *Eisen* District Court not only acted properly in holding a preliminary hearing with respect to the issue of which party shall bear the cost of notice, but that the court required more than was necessary in assessing the "likelihood of success." The salient issue with respect to a hearing concerning the burden of "cost of notice" realtes only to whether or not the litigation is *capricious* or *frivolous*[9] and whether or not there is some reasonable basis for the claims alleged. With this finding, the class action has real benefit to defendants, for if successful, defendants will have the broad *res judicata* protection against *bona fide* claims, not

---

8. The burden upon a plaintiff to demonstrate this "likelihood of success" prior to completion of the discovery process is a heavy one, particularly in antitrust cases where often the defendants have exclusive knowledge of the acts, events and evidence from which the violations can be proved. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) (". . . the proof is largely in the hands of the alleged conspirators. . . .")

9. See *Philadelphia Electric Co. v. Anaconda American Brass Company*, 43 F.R.D., 452, 458 (E.D. Pa. 1968), an early and leading decision under Amended Rule 23: "It is enough for present purposes to state that the indictments, the sentences imposed thereunder, and some of the results of the discovery to date, together *warrant a finding that plaintiffs' claim of conspiracy may have merit and is a genuine issue in this litigation.*" [Emphasis added.]

frivolous and capricious claims. Moreover, with respect to the burden of costs of notice, the plaintiff has the opportunity to demonstrate that there is substance behind its allegations. Thus, the class action proceeds in the context of meaningful litigation and any chances of potential abuse of the class action device are substantially lessened.

The important reality, and in many instances the lifeblood of successful class action litigation, is that the notice required by Rule 23 be accomplished. If requiring the defendants in a given case initially to pay, either in whole or in part, for such notice advances the litigation, then nothing in Rule 23 prohibits a court from so ordering. Admittedly, Rule 23 is silent as to which party(ies) shall pay for notice to the class.

Rule 23 was born in Equity;[10] accordingly, equitable principles are appropriate for determining which party(ies) must bear the cost of notice. In construing the equitable powers of the courts under Section 16 of the Clayton Act, this Court stated that a Section 16 remedy

> ". . . like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330, 64 S. Ct. 587, 592. 88 L. Ed. 754 (1944). Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' *Id.*, at 330, 64 S. Ct. 592." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 129, 131 (1969).

Following this spirit, if defendants ultimately prevail and thus benefit from the class action, equitable principles

10. "The class action was an invention of equity * * * mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

dictate that they pay for the notice. In this way, the efficiency and effectiveness of the class action is guaranteed.

The District Court must be free to exercise its discretion in administering Rule 23 so that the ends of justice are best served. The power to place costs of notice upon a particular party(ies) must be within that discretion.

C. "Fluid class recovery" assures the manageability of class actions and furthers the purpose and intent of the Antitrust laws.

The issue of proof of damages has often been raised by defendants in class action antitrust cases as an unmanageable procedural morass which requires the denial of class action status. Arguments are made that jury trials on the issue of damages for class members will outlive the expected lives of jurors and judges alike; that the issue of each class member's damages raises individual, not common, questions which are so overwhelming that the class cannot be managed. The District Court in *Eisen*, envisioned the great benefits of the class action by resolving at one proceeding the common issues of liability for the millions of class members injured by the alleged violations. As for damages, the court applied the doctrine of "fluid class recovery." By that doctrine, the defendants, if liable, must disgorge to the class all their overcharges as a result of their violations. Allocation of that recovery among the class then follows in proceedings before the court *vis a vis* the defendants or what was the total amount of injury defendants caused this class of plaintiffs as a result of their violations. In this way, the liable defendants must disgorge all their ill-gotten gains. Of course, inherent in this determination is whether the particular case is suitable for the application of the "fluid class recovery" doctrine.

Most recently, the Court of Appeals for the Ninth Circuit cogently recognized that

> ". . . The day is long past when courts, particularly federal courts, will deny relief to a deserving

> plaintiff *merely because of procedural difficulties or problems of apportioning damages." In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, — F.2d — (9th Cir. 1973), 1973-1 CCH Trade Cases, ¶74,733. [Emphasis added.]

The court continued:

> ". . . Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra*, 392 U.S. at 494." *Ibid.*

The distaste for the retention by guilty antitrust defendants of their ill-gotten gains has repeatedly been expressed and emphasized by the courts.[11] The "fluid class recovery" doctrine assures that antitrust defendants will not profit by their wrongdoing and that defense of antitrust violations committed by them is more than a nominal "expense of doing business" to the wrongdoers. Rather, damages will be awarded to the class as a whole,[12] not just to those class members who eventually come forward to prove claims. In this way, the impact of private enforcement of the antitrust laws is strengthened and the Congressional intent promoted.

As to unclaimed portions of the "fluid class recovery" by class members who do not come forward or who no longer exist, that problem is also susceptible to solution by appropriate judicial machinery. The problem is further alleviated where States and political subdivisions comprise

---

11. *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1088 (2d Cir. 1971); *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 74 (D. N.J. 1971); *In re Pretrial Proceedings in Western Liquid Asphalt Cases, supra.*

12. The "fluid class recovery" is entirely consistent with the "True Class Action" under former Rule 23. However, the amendment in 1966 removed the distinctions between "true," "hybrid" and "spurious" class actions, giving them all the *res judicata* effect in favor of defendants.

the class, for excess funds can be employed for a public use. See *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971). Moroever, with respect to States and their political subdivisions, where appropriate, distribution can be made on a demographic basis. See *City of Philadelphia v. American Oil Co.*, Civ. No. 647-68 and related cases (D. N.J.). With respect to non-governmental entity classes, unclaimed funds may be subject to state escheat laws. Whatever the ultimate machinery utilized, the district court must be allowed to exercise its discretion to determine whether "fluid class recovery" is appropriate in a particular case and if so, the manner of implementation.

Shortly after its promulgation, Professor Kaplan warned of Rule 23:

> "There are some who are repelled by these massive, complex, unconventional lawsuits because *they call for so much judicial initiative and management.* We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis we are dealing with cases that are not handled by existing agencies, and *I do not myself see any subversion of judicial process here but rather a fine opportunity for its accomodation to new challenges of the times.* The class action takes its place in a larger search for pliant and sensitive procedures. . . . Kaplan, "A Prefatory Note," 10 B.C. Ind. & Com. L. Rev. 497, 500 (1969) [Emphasis added].

The District Court in *Eisen* used its "judicial initiative and management" to make workable and manageable the class action procedure so that in that particular case justice would be accomplished. In *Eisen*, as in many cases commenced as class actions, without the class action device there is no vehicle which makes economically feasible the prosecution of either the plaintiff's claim or more particularly the claims of class members. Thus, without the class

action, the "doors of justice are closed"[13] and private antitrust enforcement would be "substantially reduced in effectiveness."[14] Indeed, the Court of Appeals in an earlier *Eisen* decision, 391 F.2d 555, 560 (2d Cir. 1968) cogently recognized the essential role of Rule 23:

> "Class actions serve an important function in our judicial system. By establishing a technique whereby claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."

With the availability of class actions curtailed, which is the ultimate result of the Second Circuit's decision, no longer will the States, their political subdivisions or their citizens constitute an effective source of enforcement of the federal antitrust laws. Moreover, even where states proceed alone, in situations where the costs of suit approximate or exceed the amount of damages, states will be forced to proceed with their cases through trial in order to take advantage of the provisions of Section 4 of the Clayton Act, awarding to the successful plaintiff both costs and attorney's fees. Thus, settlement of these protracted and complex cases may be less economical and less frequent,[15] resulting in additional burdens upon the courts.

13. *Weeks v. Bareco*, 125 F.2d 84, 88 (7th Cir. 1941).

14. *Hanover Shoe v. United Shoe Machinery Corp.*, *supra*, 392 U.S. at 494.

15. The Court may take judicial notice of the fact that a great many of the non-federal governmental antitrust suits brought as class actions have been settled prior to trial. E.g., *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969); *State of West Virginia v. Chas. Pfizer and Co.*, *supra*; *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *City of Philadelphia v. Interpace Corporation*, Civ. No. 48008 and related cases (E.D. Pa.); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary*

In contrast, the application of the "fluid recovery" in the class action context, if appropriate in a given case, obviates these problems. At the same time, it encourages private enforcement of the antitrust laws; it discourages future violations; it redresses the aggrieved parties for the damages they suffered; it strips the violators of their tainted profits. Moreover, judicial economy and efficiency are achieved. Indeed, the "fluid recovery" doctrine faithfully serves all the Congressional intentions upon which the antitrust laws were founded and the equitable considerations upon which Rule 23 was based.

CONCLUSION

This Court is called upon to determine significant questions affecting the full scheme of enforcement of the antitrust laws as well as other violations of law inflicting redressable injury upon classes of persons. Moreover, this is the first occasion upon which this Court has accepted the invitation to construe and apply the provisions and purposes of class action Rule 23, Federal Rules of Civil Procedure. The significance of this ruling reaches far beyond the instant case and permeates the very fabric of effective private antitrust enforcement as it exists today.

Amicus Curiae, Commonwealth of Pennsylvania, respectfully urges that this Court uphold and adopt the type of flexible and innovative application of Rule 23 as decided by the District Court in the case *sub judice*, an application vital to the effective and meaningful protection of non-federal governmental and individual rights and necessary for the continued vigorous enforcement of the antitrust laws. The conflicts between the District Court's decision and the decision of the United States Court of Appeals for

---

Corp., Civ. No. 41774 (E.D. Pa.); *City of Detroit v. Grinnell Corporation*, Civ. No. 68-4026 (S.D.N.Y.); *City of Philadelphia v. American Oil Co.*, Civ. No. 647-68 and related cases (D.N.J.).

the Second Circuit in this case represent a forked lane; one path promoting the Congressional intent and an efficient judicial process; the other stifling that intent and process.

Respectfully submitted,

ISRAEL PACKEL
Attorney General of the
Commonwealth of Pennsylvania

Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17120

Of Counsel:
Lawrence Silver,
Deputy Attorney General
Chief, Litigation Division
Gerry J. Elman,
Deputy Attorney General

David Berger
H. Laddie Montague, Jr.
David Berger, P.A.
1622 Locust Street
Philadelphia, Pennsylvania 19103